

No. 12066

United States
Court of Appeals

for the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

DIAMOND FOTOPULOS and THOMAS FOTO-
PULOS and JOAN FOTOPULOS, minors, by
and through their guardian ad litem, Diamond
Fotopulos,

Appellees.

S U P P L E M E N T A L

Transcript of Record

Appeal from the United States District Court
for the Northern District of California,
Southern Division

NAMES AND ADDRESSES OF ATTORNEYS

FRANK J. HENNESSY, Esq.,
United States Attorney,
Northern District of California,
Post Office Building,
San Francisco, California,

Attorney for Defendant and Appellant.

CARROLL S. BUCHER, Esq.,
924 Mills Building,
San Francisco, California,

Attorney for Plaintiffs and Appellees.

In the Southern Division of the United States District Court for the Northern District of California

No. 26833-H

DIAMOND FOTOPULOS and THOMAS FOTOPULOS, and JOAN FOTOPULOS, minors, by and through their Guardian ad litem, Diamond Fotopulos,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA,

Defendant.

STIPULATION

It is hereby stipulated by and between the parties hereto that the following statements may be accepted as true and without affirmative proof and may be considered as evidence in the trial of the above action.

1. That at the time of the accident sued upon in this case, Peter Fotopulos was driving the Dodge pickup truck involved in the accident.

2. That he was then of the age of 49 years, and his life expectancy on December 23, 1946, was 23.36 years.

3. That he was married to the plaintiff and guardian ad litem on November 24, 1935.

4. That he left surviving him his widow, age 29 years, and two children: Thomas F. Fotopulos, aged 10 years and Joan F. Fotopulos, aged 9 years.

5. That Peter Fotopulos died on January 10, 1947.

6. That Peter Fotopulos, at the time of the accident sued upon herein was the sole owner of the business known as the P. F. Casing Company.

7. That the net earnings of Peter Fotopulos upon which he paid Federal Income Taxes were as follows:

(a) For the year 1943.....\$ 7,872.55

(b) For the year 1945..... 15,195.92

(c) For the year 1946..... 18,574.76

8. That plaintiff, who is the widow of Peter Fotopulos, has no property or income separate and apart from her community interest.

/s/ CARROLL S. BUCHER,
Attorney for Plaintiff.

/s/ FRANK J. HENNESSY,
By /s/ RUDOLPH J. SCHOLZ,
Attorneys for Defendant.

[Endorsed]: Filed Dec. 4, 1947.

[Title of District Court and Cause.]

MEMORANDUM OF PLAINTIFF OF ACTUARIAL FACTORS

Peter Fotopulos was of the age of forty-nine (49) years at the time of his death on January 10, 1947. He was the sole owner and operator of a business known as the "P. F. Casing Company" and started in such business about twenty years previously. Notwithstanding the lean years of recession, he had kept the business going, sometimes with a partner and at other times by himself. He gradually built the busi-

ness to return a substantial income which, during the last five years of his life, increased upon a uniformly ascending scale. He had had no partner for several years prior to his death and was then receiving the entire income from the business.

He was a good business man but evidently knew little about bookkeeping, so in the latter part of 1940 he employed Adine M. Dittmore, a public accountant, to do this part of his work for him. Since then the accountant has not only made periodical audits but actually kept all of the books and records of the business and annually prepared and filed the income tax returns for the deceased.

We attach to this memorandum and submit for the consideration of the Court a statement prepared by this accountant to show the net profits to deceased for each year beginning January 1, 1941. The accountant's statement is limited strictly to the business of the P F Casing Company and does not include any rents or income from other sources.

It is significant from this statement that upon his death the business completely failed.

The widow tried for a few months to carry on but the personality and individual ability of the deceased was gone and during 1947 she operated at a loss of \$3,165.32.

In determining the amount of a judgment in damages, as here, six elements may be considered.

1. The life expectancy of deceased.
2. The relationship of the dependents to the deceased.
3. The earning power of deceased.

4. The amount of money deceased would have paid for the widow and his two children had he lived.

5. The present purchasing power of a dollar.

6. The amount of money required to produce a monthly income for the support of the widow and children, as an annuity for the period of the expectancy of the deceased, consideration being given to the periods when the children will reach their majorities.

On the day of his death Peter Fotopulos had a life expectancy of 23.36 years. He left surviving him his son Thomas F. Fotopulos who was then of the age of 10 years, Joan F. Fotopulos, his daughter, who was of the age of 9 years, and his widow Diamond Fotopulos, all of whom he then supported. Therefore Thomas would have been provided for for eleven years, Joan would have been supported for twelve years, and Diamond, his widow, would have been provided for the life expectancy of the deceased.

No one can tell what amount the deceased would have spent on his family each month had he lived. But to arrive at a fair estimate of such amount we can give consideration to his earning power, and endeavor to determine how much a man, earning what the deceased earned, would reasonably have so spent. The average annual earnings for the past five years, according to the auditor's statement, is \$12,000.00 and we respectfully submit such is a fair amount to be used as a guide to determine how much he would have spent for support.

And we further submit that, considering the

present purchasing power of the dollar, it is fair to consider, having in mind his net earnings from his business to be \$12,000.00 a year, that the support of his wife and two children, their education, clothing, food, housing and incidentals, would have cost deceased an average of \$450.00 per month.

In determining the amount of money required to return \$450.00 per month for the periods of time indicated, the interest from a sound investment of such capital should operate as a credit. Two to three per cent is about the maximum rate the widow could invest with absolute security.

Gordon Thomson, formerly and for many years the actuary for the West Coast Life Insurance Company, has compiled a statement showing the amounts required to produce certain incomes at different interest rates, the principal vanishing at the expiration of the life expectancy, and which is herewith attached. This, we believe, furnishes a fair yard stick to measure the damages that should be assessed and we respectfully submit the matter to the sound judgment of the Court.

/s/ CARROLL S. BUCHER,
Attorney for Plaintiff.

Copy of the above Memorandum and Exhibits acknowledged this 12th day of December, 1947.

FRANK J. HENNESSY,
United States Attorney,

By /s/ T. SOLOMON,
Attorney for Defendant.

Adine M. Dittmore
Public Accountant - Notary Public
995 Market St., San Francisco, Calif.

December 10, 1947

CERTIFICATE

This is to certify that I am a Public Accountant in the City and County of San Francisco.

Since the year of 1940, I have had complete charge of all books, records, and financial statements of Peter Fotopulos, doing business under the firm name and style of P. F. Casing Company, and during that period have kept a continual record and audit of the books of that firm.

My records show the following amounts which represent the annual net income or loss of Peter Fotopulos from the business for the years indicated. These figures do not represent partnership income, but the income of Peter Fotopulos from the business only.

| | | |
|------------------------|-------|-----------|
| 1941 | | 5,387.23 |
| 1942 | | 6,182.86 |
| 1943 | | 7,552.55 |
| 1944 | | 12,262.56 |
| 1945 | | 16,059.64 |
| 1946 | | 18,316.08 |
| 1947 (Loss to 12/1/47) | | 3,165.32* |

* Figures in red.

ADINE M. DITTMORE,
Accountant for P. F. Casing Co.

By /s/ JOSEPH F. BALZER,

Gordon Thomson, F.F.A.; F.A.I.A.

Consulting Actuary, 605 Market St., San Francisco

Certificate of Valuation of Monthly Annuities Certain on Bases Stated for Carroll S. Bucher, Attorney at Law, Mills Building, San Francisco.

Definitions of Annuity Certain Payable Monthly

This type of annuity is payable for a definite period of time without involvement of the element of mortality. In computing the present value the factors involved are the amount of the monthly payment, the number of months during which payable and the rate of interest used to discount to the present time the value of the future payments.

The periods of time were furnished by Mr. Bucher who explained they were based on an Expectation of Life Table, with the proviso that in the case of **the two children, the annuities would terminate in** each case at age 21. Each monthly payment consists of interest earned plus that portion of the principal necessary to make up the amount of the monthly payment and with the last monthly payment the principal is exactly exhausted.

Tables of Values

(A)

Period assumed for boy aged 10-11 years or 132 months

| Present value of | Interest Rate per Annum | | | | |
|---------------------|-------------------------|----------|----------|----------|----------|
| | 4% | 3½% | 3% | 2½% | 2% |
| \$100 per mo. | \$10665. | \$10943. | \$11231. | \$11530. | \$11840. |
| 90 per mo. | 9598. | 9849. | 10108. | 10377. | 10656. |
| 80 per mo. | 8532. | 8754. | 8985. | 9224. | 9472. |

(B)

Period assumed for girl aged 9-12 years or 144 months

| Present value of | Interest Rate per Annum | | | | |
|---------------------|-------------------------|----------|----------|----------|----------|
| | 4% | 3½% | 3% | 2½% | 2% |
| \$100 per mo. | \$11422. | \$11745. | \$12080. | \$12430. | \$12793. |
| 90 per mo. | 10280. | 10571. | 10872. | 11187. | 11514. |
| 80 per mo. | 9138. | 9396. | 9664. | 9944. | 10234. |

(C)

Period assumed for widow—23.36 years or 280.32 months

| Present value of | Interest Rate per Annum | | | | |
|---------------------|-------------------------|----------|----------|----------|----------|
| | 4% | 3½% | 3% | 2½% | 2% |
| \$300 per mo. | \$54593. | \$57395. | \$60407. | \$63650. | \$67142. |
| 270 per mo. | 49133. | 51656. | 54366. | 57285. | 60428. |
| 240 per mo. | 43674. | 45916. | 48326. | 50920. | 53714. |

(D)

Total Values—Sum of Values in Tables A, B, and C

| Present value of 3 annuities | Interest Rate per Annum | | | | |
|----------------------------------|-------------------------|----------|----------|----------|----------|
| | 4% | 3½% | 3% | 2½% | 2% |
| \$300, \$100, & \$100 per mo. | \$76680. | \$80083. | \$83718. | \$87610. | \$91775. |
| \$270, \$90 & \$90 per mo. | 69011. | 72076. | 75346. | 78849. | 82598. |
| \$240, \$80 & \$80 per mo. | 61344. | 64066. | 66975. | 70088. | 73420. |

I hereby certify the correctness of the above calculations.

Dated at San Francisco this eleventh day of December, 1947.

/s/ GORDON THOMAS,
Consulting Actuary.

[Endorsed]: Filed Dec. 12, 1947.

[Carroll S. Bucher Letterhead]

March 17, 1948

Honorable George B. Harris,
Judge of the U. S. District Court,
Post Office Building,
7th and Mission Streets,
San Francisco, California.

Re: Fotopulos vs. U. S. A. No. 26833-H

My dear Judge Harris:

Relating to the question of the amount of damages sustained by the plaintiffs in the above case I respectfully refer you to a decision of our U. S. Circuit Court of Appeals of Aug. 26, 1947 in the case of Southern Pac. Co. vs. Zehnle, 163 Fed. (2d), 453, 454. In this case the court affirmed the judgment of the lower Court and held that:

“The jury was entitled to consider, as it did, the century’s continued depreciation of the pur-

chasing value of the dollar with the extraordinary acceleration of the rate of decrease of the past decade.”

The Court further referred to a California decision with a similar ruling decided as early as 1928, —O’Meara vs. Haiden, 204 Cal. 354, 367: 268 Pacific 334.

On March 18, 1947 the District Court of Appeals of California in the case of Brown vs. Boehm, 78 Cal. App. (2d) 595, 603 held:

“There is also the further consideration that the value of the dollar has decreased substantially, thus making awards in earlier cases unsubstantial as yardsticks for measuring verdicts during the post war times.”

And more recently on July 16, 1947 the same Court reaffirmed this rule in the case of Couch vs. Pac. Gas & Elec. Co., 80 Cal. App. 857. In this decision the Court likewise held:

“Under the decision cited in the Brown case we cannot say that the amount fixed by the Court is excessive. As there pointed out, the value of the dollar has materially decreased in recent years and that fact has been recognized by Appellate Courts in refusing to reduce verdicts which formerly might have been considered excessive.”

I am sending a copy of this letter to Mr. Rudolph J. Scholz, Attorney for the Defendant.

With due appreciation of my privilege in submitting these authorities to you, I remain,

Very respectfully yours,

/s/ CARROLL S. BUCHER,

CSB/s

cc: Rudolph J. Scholz,
Attorney at Law.

[Endorsed]: Filed March 23, 1948.

[Title of District Court and Cause.]

DESIGNATION OF ADDITIONAL DOCUMENTS FOR RECORD ON APPEAL

To the Clerk of the above entitled Court:

Please prepare a supplemental Transcript on Appeal in the above case to include the following documents and forward the same to the Clerk of the United States Court of Appeals, in the Post Office Building, San Francisco, California.

1. Stipulation between Counsel filed December 4, 1947.
2. Memorandum of Plaintiff filed December 12, 1947.
3. Letter from Carroll S. Bucher to Judge George B. Harris filed March 23, 1948.

/s/ CARROLL S. BUCHER,
Attorney for Plaintiff.

Copy forwarded to Frank J. Hennessy, U. S. Attorney, February 2, 1949.

[Endorsed]: Filed February 3, 1949.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO SUPPLEMENTAL RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing documents listed below, are the originals filed in this Court in the above-entitled case, and that they constitute the Supplemental Record on Appeal herein, as designated by the Plaintiff-Appellee.

Stipulation, filed December 4, 1947.

Memorandum of Plaintiff of Actuarial Factors, filed December 12, 1947.

Letter from Carroll S. Bucher to Judge George B. Harris, filed March 23, 1948.

Designation of Additional Documents for Record on Appeal, filed February 3, 1949.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 3rd day of February, A.D. 1949.

(Seal)

C. W. CALBREATH,
Clerk.

[Endorsed]: No. 12066. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Diamond Fotopulos and Thomas Fotopulos and Joan Fotopulos, minors, by and through their guardian ad litem, Diamond Fotopulos, Appellees. Supplemental Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed February 3, 1949.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

